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No. 04-1669

IN THE

Supreme Court of the United States

ADEL SHESHTAWY, TRI-MAX INDUSTRIES, INC., AND DRILL BIT INDUSTRIES, INC., PETITIONERS

v.

AMAL SHESHTAWY

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH COURT OF APPEALS OF TEXAS AT SAN ANTONIO, TEXAS

PETITION FOR REHEARING

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INTRODUCTION

The primary issue in this case originated in a divorce case. The husband developed a product that he patented, the wife wanted an ownership interest in the patent as part of the property distribution, and the Texas courts gave her an ownership interest. This Court should address the issues in the case for the additional substantial reasons stated below.

ARGUMENT

1. The issue is important to the jurisprudence of the United States. - Petitioners are aware that the Court grants petitions only in cases containing policy questions of national importance. They suggest, however, that this case satisfies that requirement. It presents a policy question on patent law that (1) has not been addressed by the Court and (2) has widespread implications for litigants throughout the United States.

There are thousands of divorces and contract disputes each year and some portion of those will require the courts to determine ownership or division of patents. Until this Court provides guidelines for the resolution of that issue, the results throughout the nation will be erratic.

Because virtually no other courts have addressed this problem within the context of patent law, the parallel decision in copyright law, *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000), cert. den. 532 U.S. 905 (2001), must be used to illustrate the importance of the issue.

Since *Rodrique* was decided in 2000, it has been cited by nine other courts.[1] It has been the subject of 22 law review articles.[2]

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[1] *In re Valley Media, Inc.*, 279 B.R. 105 (Bankr. D. Del. 2002); *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572 (5th Cir. 2003); *Kasten v. Jerryton*, 2005 U.S. Dist. LEXIS 340 (E.D. La. Jan. 6, 2005); *Teller v. Teller*, 53 P.3d 240 (2002 Haw.); *Lanza v. Lanza*, 898 So. 2d 280 (La. 2005); *Riceland Petroleum Co. v. N. Am. Land Co.*, 869 So. 2d 894 (La. App. 2004); *Phila. Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003) (Concurring Opinion); *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.–Houston [1st Dist] 2003); *Miner v. Miner*, 2002 Tex. App. LEXIS 5841 (Tex. App.–Corpus Christi 2002).

[2] *Entrepreneurial Copyright Fair Use: Let the Independent Contractor Stand in the Shoes of the User*, 57 Ark. L. Rev. 539 (2004); *Unequal Treatment and Creditor Frustrations: The Limited Impact of Legalizing Same Sex Marriage*, 21 Bank. Dev. J. 743 (2005); *Publicity Rights As Property Rights*, 23 Cardozo Arts & Ent. 71 (2005); *Properties of Marriage*, 104 Colum. L. Rev. 75 (2004); *Copyright Registration Practice for the Non-Copyright Attorney*, 52 LA Bar Jnl. 448 (2005); *Recent Developments: TM Intellectual Property Law*, 48 LA Bar Jnl. (2000); *Community Property and the Copyright Act: Rodrigue's Recognition of a Community Interest in Economic Benefits*, 61 La. L. Rev. 655 (2001); *Acknowledging Information Technology Under the Civil Code: Why Software Transactions Should Not Be Treated As Sales*, 50 Loy. L. Rev. 461 (2004); *How Copyrights Became Community Property (Sort of): Through The Rodrigue v. Rodrigue Looking Glass*, 47 Loy. L. Rev. 631 (2001); *Fifth Circuit Symposium: Intellectual Property*, 46 Loy. L. Rev. 1059 (2000); *Foreclosing on Fame: Exploring The Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. Rev. 1322 (2002); *Intellectual Property Distribution in Divorce Settlements*, 18 Quinn. Prob. Law Jour. 160 (2004); *Stop Mucking Up Copyright Law: A Proposal for a Federal Common Law of Contract*, 35 Rutgers L.J. 959 (2004); *Annual Survey of Texas Law: Family Law: Husband and Wife*, 58 SMU L. Rev. 877 (2005); *Annual Survey of Texas Law: Family Law: Husband and Wife*, 57 SMU L. Rev. 991 (2004); *Annual Survey of Texas Law: Family Law: Husband and Wife*, 56

Most important, there is no uniformity of agreement on the correctness or wisdom of the *Rodrigue* decision. Some scholars think limiting the non-investor spouse to receipt of economic benefits from the federally created property right is a good solution to the conflict between state and federal rights. A Tulane Law Review note concluded with this observation:

> With respect with the issue of a copyright as community property, the court adopted the correct interpretation. The court in the noted case agreed with the conclusion of the Worth court, but adopted a distinct approach. By adopting Nimmer's proposed second solution, the Fifth Circuit's decision is consistent with the basic principles of both community property and copyright law. This decision allows both copyright and community property law to coexist under Louisiana state law. The justifying principle for community property is economic equality, which is clearly maintained

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SMU L. Rev. 1659 (2003); *Deriving a (Moral) Right for Creator*, 36 Tex. Int'l L.J. 735 (2001); *Intellectual Property*, 33 Tex. Tech L.Rev. 911 (2002); *Rodrigue v. Rodrigue: The Fifth Circuit Aligns with Worth - Accepting Copyright as Community Property*, 3 Tul. J. Tech. & Intell. Prop. 165 (2001); *Rodrigue v. Rodrigue: The Fifth Circuit Holds That Copyright and Community Property Law Can Peacefully Coexist*, 76 Tul. L. Rev. 541 (2001); *When Civilian Principles Clash with the Federal Law: An Examination of the Interplay Between Louisiana's Family Law and Federal Statutory and Constitutional Law*, 76 Tul. L. Rev. 519 (2001); *The "In Writing" Requirement for Copyright and Patent Transfers: Are the Circuits in Conflict?*, 26 U. Dayton L. Rev. 43 (2000).

> by protecting Veronica's financial interest with a one-half share in all the fruits of the copyright and its derivatives. The court is also promoting the basic principles of copyright law of encouraging authorship and not disrupting the processes and stability needed for authors and purchasers of copyrights. This solution is consonant with both copyright and community property law allowing both areas of law to coexist peacefully.

Rodrigue v. Rodrigue: The Fifth Circuit Holds That Copyright and Community Property Law Can Peacefully Coexist, Lang, 76 Tul. L. Rev. 541, 552-53 (2001). (Footnote omitted.)

Some scholars think the federal courts should be able to resolve the problem by developing a federal common law of contracts. Professor Gibbons of the University of Toledo College of Law pointed out the national issues in this problem and reached the following conclusion, in a Rutgers Law Journal article:

> Copyright law is pervasive throughout a modern economy. As in the nineteenth century, land (real property) was the foundation of wealth, power, and privilege; copyright is the foundation of the modern digital economy. As copyrighted works became increasingly valuable and even easier to copy, there was a gradual shift away from copyright law to contract law to protect the interests of copyright owners and more recently to digital rights management systems. This potential conflicted with the delicate balance

between owners' exclusive rights and the public interest in access and use of the work. Contract law, as state law, inherently conflicts with Congress' express goal of uniformity. State contract law may yield different results when interpreting the same contract. This frustrates Congresses goal of uniformity and the need for market efficient contract law because copyrighted content can and must flow nationally in the stream of commerce in an orderly, predictable fashion. In light of 17 U.S.C. $ S 301 preemption and Supremacy Clause preemption, state law is an unstable foundation basis on which to build a private ordering of copyright law. The courts are unsure whether private ordering inconsistent with the default principles of copyright law are preempted or whether only affirmative public laws by state legislatures are preempted. This conflict between courts inherently breeds inconsistency. Federal courts are unable to fulfill their duty to create uniform federal law because they must apply state law to many copyright disputes. Consequently, federal courts must be released from any obligation to interpret an agreement in the same manner that a state's highest court would and must be free to impose some uniform contract law principles when construing copyright agreements. In essence, there must be a federal common law of contract to govern copyright. This new common law of copyright should evolve on a case-by-case basis as technology changes and as new business models are introduced by incorporation. It should draw on commercial experience and

> practices with the UCC, common law of contracts, and of course, UCITA. Nevertheless, if Congress elects to enact a federal body of contract law, this law should be consistent with the goals of the Copyright Act. Individuals should not be permitted to contract around provisions in the laws that are designed to protect the public's interest in promoting the useful arts and sciences. In either case, judges should always take care to encourage sound businesses practices while pruning those that frustrate the underlying copyright policies.

Stop Mucking Up Copyright Law: A Proposal for a Federal Common Law of Contract, Gibbons, 35 Rutgers L.J. 959, 1032-33 (2004).

Some scholars think state property rights should play no part in determining copyright ownership: Professor Ciolino of Loyola University made this suggestion:

> The Fifth Circuit in *Rodrigue v. Rodrigue* undertook a commendable yet formidable task: to "reconcile the respective rights and obligations of authors under federal copyright law and their spouses under Louisiana community property law." As a matter of federal preemption law, the court failed. It failed not for want of effort or creativity. Rather, it failed because the rights of authors and spouses to copyrighted works are irreconcilable under our federal statutory and constitutional framework. It failed, in short, because neither the Constitution nor the

> Copyright Act permit the vesting of copyright ownership, or any of its constituent rights, in non-author spouses.
>
> * * *
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> The problematic and ineffectual rule announced by the Fifth Circuit in *Rodrigue* should be short lived. Sister Circuits should reject its curious approach and simply hold that federal copyright law preempts state community property law. So too should state courts in Louisiana and elsewhere. Until then, misadventure awaits the judges, litigants, and lawyers who now must pass through *Rodrigue's* looking glass to implement its odd new copyright-ownership regime.

How Copyrights Became Community Property (Sort of): Through The Rodrigue v. Rodrigue Looking Glass, Ciolino, 47 Loy. L. Rev. 631, 662-63 (2001). (Footnotes omitted.)

The same problems and arguments are present in patent law. The Court has held that the federal patent laws preempt state law, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146-48 (1989), but the nature, degree, and extent of that preemption and its impact on state community property law has not been addressed. The Court should use this case as a vehicle to tell the nation's bench and bar how the sometimes competing rights established by the two bodies of law are to be harmonized, and eliminate the present confusion and uncertainty.

2. The Texas Courts are wrong. - In the second argument in their Petition, Petitioners

illustrated the errors of the lower courts. That argument need not be repeated. It suffices to say that whatever the correct policy decision may be, it is not the policy set in this case for Texas, a policy that will also be persuasive in other jurisdictions.

PRAYER

For the foregoing reasons and reasons previously stated, Petitioners ask the Court to reconsider its decision and grant this Petition.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the petition for rehearing is filed in good faith and not for delay.

Respectfully submitted,

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